

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES DETHERAGE,)
Plaintiff,)
v.)
JO ANNE B. BARNHART, Commissioner)
of Social Security Administration,)
Defendant.)
Case No. C05-0864-JLR-JPD
REPORT AND RECOMMENDATION

Plaintiff James Detherage proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (the “Commissioner”). The Commissioner denied plaintiff’s applications for disability insurance benefits (“DIB”) and Supplemental Security Income under Titles II and XVI of the Social Security Act after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below, the Court recommends that the ALJ’s decision be affirmed and this case be dismissed.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff is a fifty-six-year-old man with a high-school education. AR 55, 74. He served in the United States military for two years, and has over thirty years of work experience as an autobody repair technician. AR 55, 69, 77-78. On September 10, 2002, plaintiff filed applications for DIB and SSI. AR 55, 165. He alleged disability beginning on April 15, 2001,

01 as a result of emphysema. AR 55, 68, 165. Plaintiff's applications were denied initially and on
02 reconsideration. AR 29-32, 34-36, 171.

03 Plaintiff requested a hearing, and on December 4, 2004, an ALJ issued an opinion
04 finding that plaintiff was not disabled. AR 11-22, 177-91. Specifically, the ALJ determined that
05 plaintiff had no exertional limitations and that he was capable of performing other work in the
06 national economy. AR 21-22. Plaintiff appealed his decision, but the Appeals Council denied
07 his request for review. AR 5-7. The ALJ's December 4, 2004, decision therefore became the
08 Commissioner's final decision for purposes of this Court's review. On May 9, 2005, plaintiff
09 filed this civil suit challenging the Commissioner's decision. Dkt. No. 1.

10 II. JURISDICTION

11 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. §§ 405(g)
12 and 1383(c)(3).

13 III. STANDARD OF REVIEW

14 The district court may set aside the Commissioner's denial of social security benefits
15 when the ALJ's findings are based on legal error or not supported by substantial evidence in the
16 record as a whole. *See* 42 U.S.C. § 405(g); *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir.
17 1996) (internal citations omitted). Substantial evidence is defined as more than a mere scintilla
18 but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as
19 adequate to support a conclusion. *Smolen*, 80 F.3d at 1279. The ALJ is responsible for
20 determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities.
21 *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). Where the evidence is susceptible to
22 more than one rational interpretation, it is the Commissioner's conclusion that must be upheld.
23 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (quoting *Smolen*, 80 F.3d at 1292).

24 If the court determines that the ALJ erred, the court has discretion to remand for further
25 proceedings or to award benefits. *See Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990).
26 The court may direct an award of benefits where "the record has been fully developed and

01 further administrative proceedings would serve no useful purpose.” *McCartey v. Massanari*,
02 298 F.3d 1072, 1076 (9th Cir. 2002).

03 Such a circumstance arises when: (1) the ALJ has failed to provide legally
04 sufficient reasons for rejecting the claimant’s evidence; (2) there are no
05 outstanding issues that must be resolved before a determination of disability can
06 be made; and (3) it is clear from the record that the ALJ would be required to
07 find the claimant disabled if he considered the claimant’s evidence.

08 *Id.* at 1076-77.

09 IV. EVALUATING DISABILITY

10 As the claimant, Mr. Detherage bears the burden of proving that he is disabled within the
11 meaning of the Social Security Act. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999).
12 Disability is defined as the “inability to engage in any substantial gainful activity by reason of any
13 medically determinable physical or mental impairment, which can be expected to result in death,
14 or which has lasted or can be expected to last for a continuous period of not less than twelve
15 months[.]” 42 U.S.C. § 423(d)(1)(A). A claimant is disabled only if his impairments are of
16 such severity that he is not only unable to do his previous work, but cannot, considering his age,
17 education, and work experience, engage in any other substantial gainful activity existing in the
national economy. *See* 42 U.S.C. §§ 423(d)(2)(A), 1382(c)(a)(3)(B); *see also Tackett v. Apfel*,
180 F.3d 1094, 1098 (9th Cir. 1999).

18 The Social Security regulations set out a five-step sequential evaluation process for
19 determining whether a claimant is disabled within the meaning of the Social Security Act. *See*
20 20 C.F.R. §§ 404.1520, 416.920. At step one, the claimant must establish that he is not
21 engaging in any substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b). If the
22 claimant does so, then at step two, the claimant must establish that he has one or more
23 medically-severe impairments, or combination of impairments, that limit his physical or mental
24 ability to do basic work activities. If the claimant does not have such impairments, he is not
25 disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe
26 impairment, the Commissioner moves to step three to determine whether the impairment meets

01 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),
02 416.920(d). A claimant who meets one of the listings for the twelve-month-duration
03 requirement is disabled. *Id.*

When the claimant’s impairment neither meets nor equals one of the impairments listed in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the Commissioner evaluates the physical and mental demands of the claimant’s past relevant work to determine whether the claimant can still perform that work. *Id.* If the claimant is not able to perform his past relevant work, then the burden shifts to the Commissioner at step five to show that the claimant can perform some other work that exists in significant numbers in the national economy, taking into consideration the claimant’s RFC, age, education, and work experience. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Tackett*, 180 F.3d at 1099-100. If the Commissioner finds the claimant is unable to perform other work, then the claimant is found disabled and benefits may be awarded.

V. DECISION BELOW

16 On December 4, 2004, the ALJ issued a decision denying plaintiff's request for benefits
17 finding:

1. The claimant meets the non-disability requirements for a period of disability and Disability Insurance Benefits set forth in Section 216(I) of the Social Security Act and is insured for benefits through December 31, 2003.
2. The claimant has not engaged in substantial gainful activity since the alleged onset of disability.
3. The claimant's mild obstructive pulmonary impairment is a "severe" impairment, based upon the requirements in (20 CFR §§ 404.1520 and 416.920).
4. This medically determinable impairment does not meet or medically equal one of the listed impairments in Appendix 1, Subpart P, Regulation No. 4.

5. The undersigned finds the claimant's allegations regarding his limitations are not totally credible for the reasons set forth in the body of the decision.
6. The claimant has no exertional limitations. Non-exertionally, he needs to avoid concentrated exposure to fumes, odors, dusts, gases, and poor ventilation as well as hazards such as working around machinery or at unprotected heights.
7. The claimant is unable to perform any of his past relevant work (20 CFR §§ 404.1565 and 416.965).
8. The claimant is an "individual closely approaching advanced age" (20 CFR §§ 404.1563 and 416.963).
9. The claimant has a "high school (or high school equivalent) education" (20 CFR §§ 404.1564 and 416.964).
10. The claimant has no transferable skills from any past relevant work and/or transferability of skills is not an issue in this case (20 CFR §§ 404.1568 and 416.968).
11. The claimant has no exertional limitations (20 CFR §§ 404.1545 and 416.945).
12. Considering the range of work at all levels that the claimant is still functionally capable of performing, in combination with his age, education, and work experience, and using section 204.00 of the Medical-Vocational Guidelines as a framework for decision-making, the claimant is not disabled.
13. The claimant was not under a "disability," as defined in the Social Security Act, at any time through the date of this decision (20 CFR §§ 404.1520(g) and 416.920(g)).

AR 21-22.

VI. ISSUES ON APPEAL

The plaintiff has taken a scatter-shot approach to this appeal. It appears that the primary assignments of error can be summarized as follows:

- A. Did the ALJ properly evaluate the conflicting medical opinions?
- B. Did the ALJ utilize the appropriate standard for evaluating subjective symptom testimony?
- C. Did the ALJ err in his credibility analysis?

- D. Did the ALJ erroneously determine plaintiff's age?
- E. Did the ALJ err by failing to obtain vocational expert testimony?

VII. DISCUSSION

A. The ALJ Did Not Err in His Evaluation of the Conflicting Medical Opinions.

The ALJ found that plaintiff had no exertional limitations, but determined that he had certain environmental limitations. AR 21. Specifically, he adopted Dr. Hoskins' opinion and found that plaintiff had to avoid environments with "concentrated fumes, odors, dusts, gases, and poor ventilation as well as hazards such as working around machinery or at unprotected heights." AR 21. The ALJ also stated that no other "opinions from a treating or examining physician indicat[e] that the claimant is disabled or even has limitations greater than those determined in this decision." AR 19.

As an initial matter, plaintiff argues that the latter statement is inaccurate because the opinions of Drs. Zimmerman and Lee suggest more restrictive limitations. Dkt. No. 13. This argument ignores the fact that prior to this statement, the ALJ rejected the opinions of Drs. Zimmerman and Lee. The statement was simply the ALJ's attempt to identify and evaluate the remaining conflicting medical evidence and resolve ambiguities in the record. *Andrews*, 53 F.3d at 1039. While the ALJ's statement could have been more precise, it does not warrant reversal.

Ultimately, plaintiff's argument rests not on whether this statement is accurate, but rather upon his view that the ALJ should have preferred the opinions of Drs. Zimmerman and Lee to those of Drs. Chalaka and Hoskins. The ALJ rejected the opinions of Drs. Zimmerman and Lee, because he found them to be inconsistent with what he determined were more reliable medical opinions. AR 16-17.

Dr. Zimmerman diagnosed plaintiff with nicotine dependency and emphysema, which he considered a marked impairment that rendered plaintiff "severely limited," unable to stand, walk

01 or lift even two pounds. AR 146-47. Dr. Lee evaluated plaintiff on June 24, 2003, and
02 diagnosed him with chronic obstructive pulmonary disease of moderate severity. AR 158. She
03 opined that he could perform sedentary work only. AR 158-59. Both doctors recommended
04 plaintiff see a pulmonologist. AR 147, 159.

05 Upon Dr. Lee's referral, Dr. Chalaka, a pulmonary specialist, performed a pulmonary
06 function test and found plaintiff to have "mild obstructive pulmonary impairment, with mild-to-
07 moderate impression in spirometry after bronchodilator therapy[.]"¹ AR 160. Other than to
08 characterize plaintiff's condition as "mild-to-moderate," Dr. Chalaka assigned no functional
09 limitations. On January 28, 2003, Dr. Hoskins reviewed plaintiff's medical records, including
10 his pulmonary tests, chest x-rays, and the treatment notes from Drs. Zimmerman and Lee. *See*
11 AR 156. Upon review of these records, he concluded that plaintiff had no exertional limitations,
12 but that he should avoid working around concentrated fumes and hazardous equipment. AR
13 153-56. The ALJ adopted Dr. Hoskins' opinion, and in doing so, rejected the impairment
14 assessments of Drs. Zimmerman and Lee.

15 An ALJ may reject the controverted medical opinion of an examining physician only
16 when he provides specific and legitimate reasons that are supported by the record. *Moore v.*
17 *Comm'r*, 278 F.3d 920, 924 (9th Cir. 2002) (quoting *Lester*, 81 F.3d at 830-31). The ALJ met
18 that standard. The ALJ determined that the assessments of Drs. Zimmerman and Lee were
19 inconsistent with the objective testing performed by Dr. Chalaka. AR 16-17. Moreover, Dr.
20 Zimmerman assessed the plaintiff as severely limited, and unable to stand, walk, or lift at least
21 two pounds. AR 147. This assessment is at odds with statements the plaintiff gave to Dr.
22 Strangland that he felt better because he was not longer doing auto-body work and that he
23 could walk a mile on flat ground. AR 16.

24

25 26 ¹Dr. Chalaka performed an earlier pulmonary function test that produced similar results: "mild obstructive pulmonary impairment without significant improvement in spirometry after bronchodilator therapy." AR 131.

01 Plaintiff appears to argue that the ALJ erred by according Dr. Hoskins' opinion too
 02 much weight. Dkt. No. 13. He argues that the opinion was entitled to less weight because Dr.
 03 Hoskins is a non-examining state-agency physician and is not a pulmonologist. *Id.*

04 The opinions of non-examining physicians are generally entitled to less weight than
 05 treating or examining physicians. *See Lester*, 81 F.3d at 831; 20 C.F.R. §§ 404.1527,
 06 416.927(d). ALJs must evaluate these opinions and explain the weight they place on them. 20
 07 C.F.R. §§ 404.1527(f), 416.927(f); SSR 96-6p. In cases where non-examining doctors have
 08 access to better records than other physicians, their opinions may be entitled to greater weight.
 09 SSR-96-6. Here, the ALJ set forth an evaluation of the medical evidence, including Dr.
 10 Hoskins' report, and concluded that Dr. Hoskins' opinion was consistent with the evidence
 11 overall. This determination falls within the ALJ's discretion to weigh and evaluate the medical
 12 evidence. *Batson*, 359 F.3d at 1196. Additionally, the fact that Dr. Hoskins was not a
 13 pulmonologist does not require reversal. Dr. Hoskins properly relied on, among other things,
 14 the reports of Dr. Chalaka, who was a pulmonologist.² AR 156; *see also* SSR-96-6p
 15 (indicating reliance on specialists' medical report may justify ALJ in preferring non-examining
 16 opinions over treating opinions).

17 The role of this Court is limited. Where the evidence is susceptible to more than one
 18 rational interpretation, the Commissioner's conclusion must be upheld. *Thomas*, 278 F.3d at
 19 954. In this case, the Court cannot conclude that the only rational interpretation of the medical
 20 evidence is that offered by the plaintiff. The Commissioner's decision is supported by
 21 substantial evidence.

22 B. The ALJ Did Not Err By Citing *Nyman v. Heckler*.

23 Plaintiff argues that the ALJ erroneously relied on *Nyman v. Heckler*, 779 F.2d 528,
 24 531 (9th Cir. 1985), to support his evaluation of plaintiff's subjective-symptom testimony.

25 _____
 26 ² Neither Dr. Zimmerman nor Dr. Lee, both of whom plaintiff prefers, were
 pulmonologists.

01 Dkt. No. 13. Plaintiff claims that *Nyman* is no longer good law, because the concurring
 02 opinion in *Bates v. Sullivan*, 894 F.2d 1059 (9th Cir. 1990), which relied on *Nyman*, was
 03 overruled. *Id.* This argument is misleading. The Ninth Circuit has held that the concurring
 04 opinion in *Bates* misinterpreted *Nyman*, not that the holding in *Nyman* itself was infirm. *See*
 05 *Bunnell v. Sullivan*, 947 F.2d 341, 347-48 (9th Cir. 1991) (en banc). *Nyman* still appears to be
 06 good law and, more importantly, is consistent with recent Ninth Circuit caselaw on credibility
 07 analysis standards. *See Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005) (internal
 08 citations omitted). The ALJ's citation to *Nyman* cannot serve as a basis for reversal of this
 09 case. AR 17.

10 C. The ALJ Did Not Err in His Credibility Analysis of Plaintiff's
 11 Subjective- Symptom Testimony.

12 Plaintiff also attacks the ALJ's analysis of his credibility on several points. Dkt. No. 13.
 13 He raises at least four assertions of error and argues that substantial evidence does not support
 14 the ALJ's decision as a whole. *Id.* Each argument is discussed below.

15 1. The ALJ Did Not Erroneously Fail to Consider Plaintiff's
 16 Inability to Afford Treatment.

17 Plaintiff argues that the ALJ's credibility analysis was flawed, because it failed to
 18 consider the fact that plaintiff could not afford prescribed treatment. Dkt. No. 13. For
 19 instance, plaintiff said that he declined a chest x-ray and pulmonary function test because of
 20 cost. AR 130. However, plaintiff had several pulmonary tests and the chest x-ray, though the
 21 latter does not appear in the record. AR 131-52, 156, 160-63. This was not the "treatment"
 22 to which the ALJ was referring, but that plaintiff continued to smoke at least a pack of
 23 cigarettes per day, despite the fact he had been diagnosed with emphysema. AR 18.

24 Plaintiff also testified he could not afford a nicotine patch to help him quit smoking.
 25 AR 188. In light of the fact that plaintiff could afford an inhaler, one to two packs of cigarettes
 26 a day, three to four six packs of beer a week, and a fifth of whiskey for the weekend (AR 16),
 it was certainly within the discretion of the ALJ to disbelieve the plaintiff's statements that he

1 could not afford a nicotine patch. Additionally, plaintiff's doctors did not direct him to use a
2 nicotine patch, but directed him to quit smoking. AR 130. Although it is true that an ALJ may
3 not rely upon a claimant's failure to follow treatment when the record demonstrates that he
4 cannot afford it, quitting smoking is not the type of cost-prohibitive treatment this rule
5 contemplates. *See Regennitter v. Comm'r of Soc. Sec. Admin.*, 166 F.3d 1294, 1296-97 (9th
6 Cir. 1999) (inability to afford frequent doctor's examinations and pain medication); *see also*
7 *Gamble v. Chater*, 68 F.3d 319, 321-22 (9th Cir. 1995) (inability to afford prosthetic device);
8 SSR96-7p (directing ALJs to consider whether a claimant can afford or have access to medical
9 care).

2. The ALJ Did Not Improperly Deny Benefits Based on Plaintiff's Failure to Follow Prescribed Treatment.

According to plaintiff, the ALJ implicitly relied upon 20 C.F.R. § 404.1530 (and 20 C.F.R. § 416.930) to reject plaintiff's application because he had failed to follow treatment. Dkt. No. 13. He argues, that the ALJ did not satisfy the requirements for denying benefits based on the regulation. *Id.* Defendant argues that the ALJ properly determined that plaintiff's failure to quit smoking "undercut his claim that he was disabled by his symptoms," and that the denial was not based on that section alone. Dkt. No. 14.

Plaintiff's argument is not persuasive. The ALJ found plaintiff not disabled based on 20
C.F.R. Pt. 404, Subpt. P. App. 2, § 204, and not his failure to follow treatment. AR 21.
Rather, the ALJ discredited plaintiff's testimony, in part, because of his "[f]ailure to stop
smoking." AR 18. He found plaintiff's failure to follow doctors' advice to quit smoking as
evidence that tended to impeach his credibility. *Id.* The ALJ cited *Kelley v. Barnhart*, 372
F3d 958, 961 (8th Cir. 2004), *Holley v. Massanari*, 253 F.3d 1088, 1092 (8th Cir. 2001), and
Decker v. Chater, 86 F.3d 953, 955 (10th Cir. 1996), for the proposition that "[f]ailure to
follow treatment recommendations reflects on the credibility of impairments." AR 18. The
Eighth Circuit cases and Ninth Circuit cases are similar in holding that plaintiff's failure to seek
treatment, or to adequately explain the failure to do so, is a proper reason for discrediting a

01 plaintiff's subjective-symptom testimony. *Burch*, 400 F.3d at 681; *Fair v. Bowen*, 885 F.2d
 02 597, 603 (9th Cir. 1989).

03 3. The ALJ Did Not Err By Failing to Consider the
 04 Difficulty of Quitting Smoking.

05 Plaintiff states that the ALJ's credibility analysis was flawed because it failed to
 06 consider adequately the difficulty of quitting smoking. Dkt. No. 13. Plaintiff cites no
 07 controlling authority for this proposition, and has not shown that the ALJ erred on this point.

08 4. The ALJ Provided Appropriate Reasons For Finding
 09 Plaintiff's Daily Activities Inconsistent With His
 10 Impairment.

11 Plaintiff also challenges the ALJ's determination that his daily activities were
 12 inconsistent with his claimed disability. Dkt. No. 13. He argues that the ALJ's assertion that
 13 his allegedly limited daily activities cannot be verified is inadequate, because the ALJ must
 14 evaluate both objective and non-objective medical evidence. *Id.* Plaintiff argues that the ALJ
 15 failed to provide adequate explanation for why his daily activities were inconsistent with his
 16 disability. *Id.*

17 Once a claimant produces medical evidence of an underlying impairment, the ALJ may
 18 not discredit the claimant's testimony as to the severity of symptoms solely because they are
 19 unsupported by objective medical evidence. *Bunnell*, 947 F.2d at 343; *Reddick v. Chater*, 157
 20 F.3d 715, 722 (9th Cir. 1998) (internal citations omitted). With no positive evidence showing
 21 that the claimant is malingering, the ALJ must provide "clear and convincing" reasons for
 22 rejecting the claimant's testimony.³ *Smolen*, 80 F.3d at 1284; *Reddick*, 157 F.3d at 722. When
 23 evaluating a claimant's credibility, the ALJ must specifically identify what testimony is not

24 3The ALJ may consider "ordinary techniques of credibility evaluation" including a
 25 claimant's reputation for truthfulness, inconsistencies in their testimony, or between their
 26 testimony and conduct, daily activities, work record, and testimony from physicians and third
 parties concerning the nature, severity, and effect of the symptoms of which the claimant
 complains. *Smolen*, 80 F.3d at 1284; *see also Light v. Social Sec. Admin.*, 119 F.3d 789, 792
 (9th Cir. 1997) (internal citations omitted).

01 credible and what evidence undermines the claimant's complaints; general findings are
 02 insufficient. *Smolen*, 80 F.3d at 1284; *Reddick*, 157 F.3d at 722.

03 The ALJ provided an appropriate basis for concluding that plaintiff's activities were
 04 inconsistent with his alleged impairment. First, he observed that plaintiff's claimed activities
 05 were difficult to verify objectively. AR 17. While this by itself does not satisfy the *Smolen*
 06 standard, the ALJ also found that even if plaintiff's daily activities were as he stated, they were
 07 inconsistent with the alleged degree of impairment. AR 18. These included failure to use
 08 Albuterol during the day, his daily activities of cooking, cleaning, vacuuming the house, and
 09 walking to the store. AR 18. He also stated that if the impairment was as severe as claimed by
 10 the plaintiff, the medical record would be substantially different. AR 19.

11 This case is similar to *Burch v. Barnhart, supra*. In *Burch*, the plaintiff alleged
 12 primarily an obesity-based disability. The ALJ rejected the plaintiff's pain testimony, citing the
 13 plaintiff's daily activities, which suggested to the ALJ that the plaintiff was functional. The
 14 Ninth Circuit held that the evidence of daily activities could also support the plaintiff's claims
 15 of disability. However, the ALJ's interpretation was also rational, and held "we must uphold
 16 the ALJ's decision where the evidence is susceptible to more than one rational interpretation."
 17 *Id.* at 680-81. Just as in *Burch*, the plaintiff's activities and lack of treatment can be subject to
 18 more than one rational interpretation. In this case, as in *Burch*, the ALJ's interpretation of the
 19 evidence must be upheld.

20 D. The Issue of Plaintiff's Age Does Not Warrant Remand.

21 Plaintiff argues that the ALJ erred by determining that plaintiff was a person "closely
 22 approaching advanced age," rather than a "person of advanced age." Dkt. No. 13. He claims
 23 that this finding was accurate when plaintiff applied for benefits, but not at the time of the
 24 hearing. *Id.*

25 The ALJ's decision is unclear as to what age category he applied. The body of the
 26 decision correctly identifies that plaintiff was fifty-six years old, and that this qualifies him as a

01 “person of advanced age.” AR 15, 20; *see also* 20 C.F.R. §§ 404.1563, 416.963 (describing
02 age categories). The Findings section, however, incorrectly states that plaintiff is an individual
03 “closely approaching advanced age.” *Id.* at 21. The section the ALJ relied upon to render his
04 decision, 20 C.F.R. Pt. 404, Subpt. P. App. 2, § 204, applies to claimants with no exertional
05 limitations and does not apply an age category. Because the ALJ’s determination that plaintiff
06 had no exertional limitations is supported by substantial evidence, any error regarding the
07 plaintiff’s age is harmless. *See Batson v. Comm’r of Soc. Sec. Admin.*, 359 F. 3d 1190, 1197
08 (9th Cir. 2004).

09 E. The ALJ Did Not Err By Not Calling a Vocational Expert.

10 Plaintiff argues that the ALJ erred by failing to call a Vocational Expert (“VE”) to
11 determine whether he could perform other jobs that exist in significant numbers in the national
12 economy. Dkt. No. 13. The ALJ may satisfy his burden at step five either by calling a VE to
13 testify or by reference to the Medical-Vocational Guidelines (the “Grids”). *Tackett*, 180 F.3d
14 at 1100-01. When a plaintiff has significant non-exertional impairments, the ALJ cannot rely
15 on the Grids. *See Holohan v. Massanari*, 246 F.3d 1195, 1208 (9th Cir. 2001); *see also* SSR
16 85-15 (non-exertional impairments are “medically determinable and cause a non-exertional
17 limitation of function or an environmental restriction”). This is because the Grids are based on
18 strength factors only. *Holohan*, 246 F.3d at 1208-09.

19 The ALJ found plaintiff to have no exertional limitations, but determined that he had
20 limitations on the types of environments in which he could work. AR 21. For instance, he
21 indicated that plaintiff could not be exposed to concentrated fumes, odors or dusts, and that he
22 should avoid hazards such as machinery and unprotected heights. AR 19. These non-
23 exertional limitations are not contemplated by the Grids, but their impact on plaintiff’s ability to
24 work is “minimal because most job environments do not involve great . . . amounts of dust,
25 etc.” SSR 85-15. Thus, the ALJ’s finding of non-disability here does not necessarily require
26 reversal.

1 Although plaintiff allows that the foregoing result may be proper, he argues that the
2 ALJ's additional limitation — that plaintiff avoid “machinery or unprotected heights” — is not
3 consistent with the use of the Grids. Dkt. No. 13. By way of example, SSR 85-15 states that
4 a person with a seizure disorder who has a non-exertional limitation to avoid “unprotected
5 elevations” and “dangerous moving machinery” will not have a meaningful impact on their
6 ability to perform work. SSR 85-15. Plaintiff appears to argue that the ALJ's decision was
7 deficient, because he stated that plaintiff needed to avoid working around “machinery” rather
8 than “dangerous machinery.” Dkt. No. 13.

9 Plaintiff's reading of SSR-85-15 is too narrow. The above-cited example stands for the
10 proposition that an ALJ need not call a VE when certain environmental limitations would not
11 have any meaningful impact on the availability of jobs that a claimant could perform. Here,
12 plaintiff was diagnosed with emphysema, and the record repeatedly indicates that industrial
13 fumes and heavy machinery, such as diesel engines, impacted his breathing. These are the
14 types of machines the ALJ was impliedly referring to in his decision. AR 19, 181-88. There is
15 no indication that pencil sharpeners, computers, blenders, or other common machines would
16 have any impact on him. Although it may have been preferable for the ALJ to call a VE to
17 make this finding, the ALJ's failure to do so does not require reversal.

VIII. CONCLUSION

19 For the reasons discussed above, the Court recommends that the ALJ's decision be
20 affirmed and this case be dismissed. A proposed order accompanies this Report and
21 Recommendation.

22 DATED this 7th day of March, 2006.

James P. Donohue
JAMES P. DONOHUE
United States Magistrate Judge